Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act-- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

To: The Commission

COMMENTS OF SUSAN M. BECHTEL

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I.
Summary

1. The retroactive imposition of auctions on pending comparative cases confiscates the investment of the applicants who must now purchase the frequency rights at market value contrary to the due process and implied equal protection provisions of the Fifth Amendment of the Constitution.

2. The Commission should revise its comparative criteria and process pending comparative cases based on those criteria. An illustrative form of revised criteria is provided.

3. Under established Commission and court precedent, special privileges should not be given to women or minorities in the broadcast auction rules. They will benefit, along with all others, from special privileges accorded to small business applicants.

II.
Identity of commenting party

4. The experience and credentials of Susan M. Bechtel to offer comments in this matter are these:

(a) In September 1986, she filed an application for construction permit for a new FM radio station in Selbyville, Delaware, in the Ocean City, Maryland area. Alone among the three applicants still remaining in the proceeding, Mrs. Bechtel had a history of part-time vacationing and residence in the service area for a period of more than 40 years. She also proposed to serve 21% more population than the party selected by the Commission for awarding the station authorization. She is not an experienced broadcaster and proposed to hire such a person to manage the radio station.

(b) In November 1987 [one year and two months after her application was filed], the Commission designated the then eleven competing applications for hearing. 2 FCC Rcd. 7051.

(c) In July 1989 [two years and ten months after her application was filed], Judge Chachkin issued an initial decision placing her application last among the four parties still remaining in the proceeding because Mrs. Bechtel failed to propose to personally manage the station. Under the Commission's comparative criterion for "integration of ownership and management," her proferred testimony regarding hiring a professional manager was rejected and her 40-year residential relationship with the area was ignored. 4 FCC Rcd. 5687.

(d) In April 1990 [three years and seven months after her

application was filed], the Review Board affirmed the adverse rulings regarding Mrs. Bechtel's case. 5 FCC Rcd. 2432.

(e) In February 1991 [four years and five months after her application was filed], the full Commission affirmed the adverse rulings regarding Mrs. Bechtel's case. 6 FCC Rcd. 721.

(f) In January 1992 [five years and four months after her application was filed], the court remanded the case for the Commission to consider Mrs. Bechtel's arguments challenging the "integration" criterion. Bechtel v. FCC (I), 957 F.2d 873 (D.C.Cir.).

(g) In July 1992 and in March 1993 [the latter six years and six months after her application was filed], the Commission issued decisions on remand, again rejecting the position of Mrs. Bechtel. 7 FCC Rcd. 4566, 8 FCC Rcd. 1674.

(h) In December 1993 [seven years and three months after her application was filed], the court held the "integration" criterion to be arbitrary and capricious, and remanded the case to the Commission to consider Mrs. Bechtel's application free of this unlawful policy. Bechtel v. FCC (II), 10 F.3d 875.

(i) To date [eleven years and four months after her application was filed], the Commission has taken no action in the remand of Mrs. Bechtel's application.

III.
It is unlawful to impose an auction mechanism for the sale of the frequency at market value to citizens who have made their investment in reliance on a comparative selection mechanism

5. The Balanced Budget Act of 1927 permits, but does not

require, the FCC to auction the Selbyville FM channel in question. 47 U.S.C. §309(l). This statute is unlawful, as would be Commission implementation of an auction of the Selbyville FM channel pursuant to the statute.

6. Such action effectively confiscates the investment of Mrs. Bechtel in filing and litigating her application for more than eleven years. She must either pay money into the United States Treasury in order to buy the rights to the frequency at market value or else abandon her more than eleven-year investment altogether. She is deprived of the fruits of her work in bringing an end to an unlawful practice. The court's adjudication of unlawfulness becomes obiter dicta in her own case. All of this is a taking of Mrs. Bechtel's property under the Fifth Amendment of the Constitution. Moreover, under the lottery provisions of 47 U.S.C. §309, other citizens file applications with advance knowledge of the use of the auction mechanism and can plan their investments accordingly. Imposition of the auction mechanism denies citizen Susan M. Bechtel the implied equal protection of the laws under the Fifth Amendment of the Constitution.

7. This taking of property and denial of implied equal protection are to be done without due process of law. The operation of the statute, and of any Commission regulations implementing the statute, as applied to the Selbyville FM channel, is arbitrary and capricious, and there is no arguably rational reason to explain it.

(a) The need for the agency to fix its comparative criteria is no such reason. The Commission and its predecessor agency, the Federal Radio Commission, have been successfully allocating frequencies and awarding licenses relative to the various types of communications uses for 71 years since 1927. These agencies have been able to devise and implement regulatory mechanisms geared to the public interest which, with rare exceptions, have been found to be lawful. On those occasions when a given aspect of the agency's work has been found wanting, the Commission has corrected the deficiency and continued on with its business. So, too, it should been with regard to the December 1993 court decision in Bechtel II, which struck down a portion of only one of eight comparative criteria. One illustrative way in which the comparative criteria may be adjusted is set forth infra. The agency's four-year paralysis on this score, for whatever reason, which to our knowledge has never been rationally explained, is no excuse.

(b) A legislative purpose to clear out pending comparative cases in an administratively expedient way is not an arguably rational reason for the retroactive imposition of the auction mechanism to Mrs. Bechtel's application. An administratively expedient way to do that is to change to a lottery mechanism, employed in various other contexts, which would redirect her more than eleven-year investment, not obliterate it.

(c) A legislative purpose to balance the nation's budget cannot arguably justify the blind-sided confiscation of the

investment of a single citizen in this manner.

8. The precedent cited in the Commission's notice of proposed rulemaking released November 26, 1997, at ¶¶13-15, do not support a retroactive application of the auction mechanism to Mrs. Bechtel's application. Each will be discussed in turn.

9. Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C.Cir. 1989) involved a comparative proceeding for the award of an instructional television license in which the Commission's comparative criteria were followed as previously announced and relied upon by the applicants, i.e., favoring a local educational applicant over an outside educational applicant. There was no change in the groundrules on that score. The outside educational applicant sought to assert the right to have an evidentiary comparative hearing, rather than an administrative comparative processing of the applications, and the court upheld the Commission's procedure to decide such cases without an evidentiary comparative hearing.

10. Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987) involved comparative applications for a cellular radiotelephone license for which the groundrules were changed from certain comparative criteria to the use of a lottery mechanism. The court affirmed the Commission's change in the groundrules. The differences between Maxcell and Mrs. Bechtel's application are decisional:

(a) Before the Maxcell party filed its application, the FCC had already given public notice that it might change to the

lottery mechanism. Mrs. Bechtel did not learn of the change to the auction mechanism until after more than eleven years of litigation.

(b) The change to the lottery mechanism in Maxcell came before the applicant had incurred litigation costs under the comparative hearing procedure, and thus saved the applicant large sums of money in the prosecution of its application. In Mrs. Bechtel's case, the change occurred after a hearing before the Administrative Law Judge, a proceeding before the FCC's appellate Review Board, a half-dozen or more applications for review or petitions to the full Commission and two appeals to the Court of Appeals.

(c) In Maxcell, the regulatory change converted the applicant's investment from a prospective hearing procedure to participation in a lottery as a means of winning. In Mrs. Bechtel's case, her investment is simply wiped out. Her choices are two, either to walk away from the investment or, in effect, pay twice for the frequency, a governmental form of "double dipping."

11. Chadmoore Communications, Inc., 113 F.3d 235 (D.C.Cir. 1997) involved a party who had duly received the wide-area specialized mobile radio (SMR) license for which it applied. The issue in the case was the validity of a subsequent rule change reducing the time period for completion of construction of the SMR system. On the facts, the court upheld the Commission's rule change as applied to this licensee.

12. DIRECTV, INC. v. FCC, 110 F.3d 816 (D.C.Cir. 1997) involved parties who had duly received the licenses for direct broadcasting to homes from satellites (DBS), for which they had applied. At one point in time, the FCC stated that if certain other DBS channels were reclaimed from another party, the extra DBS channels would be reallocated pro-rata to these licensees. Instead, the FCC decided to put the reclaimed DBS channels out for auction, and the court affirmed. The complaining licensees got what they applied for. They didn't get any bonus frequencies, for which they must pay the market price if they want them. Otherwise, these parties will continue owning and operating the DBS channels duly licensed to them. Their investment was not extinguished by legislative fiat more than a decade after their applications had been filed and while they were still waiting for an agency decision.

IV.
For applications filed prior to July 1, 1997, or, at the minimum, those filed prior to the 1994 freeze, modified comparative criteria should be adopted and implemented

13. For the reasons stated above, and as a matter of sound and fair regulatory policy, the Commission should correct its comparative criteria and apply the criteria to all competitive broadcast applications filed prior to July 1, 1997, or, as a minimum matter, all competitive broadcast applications filed prior to the freeze announced on February 25, 1994. FCC Freezes Comparative Hearings, 9 FCC Rcd. 1055.

14. As an illustrative example, set forth below is a form

of regulation establishing modified comparative criteria:

> The provisions of this subsection apply to comparative broadcast proceedings involving applicants for only new facilities that were filed on or before July 1, 1997 [or February 24, 1994]:
>
> A. The comparative criteria shall consist of:
>
> (1) Broadcast experience, (2) broadcast record, (3) local residence in the proposed service area and (4) civic activity in the service area, of parties in the applicant, proportionate to their equity interests (regardless of whether the equity is voting or nonvoting), without regard to their proposed role in management, minority status or gender;
>
> (5) Efficient use of frequency;
>
> (6) Diversification of control of the media of mass communications;
>
> (7) Daytime AM station ownership; and
>
> (8) Auxiliary power facilities.
>
> B. Existing records regarding comparative issues will not be reopened for new evidence. The applicants in such cases may file proposed findings of fact and conclusions of law, and exceptions and briefs, and responsive pleadings, addressed to the existing hearing records under the eight comparative criteria in A. Administrative Law Judges and the Commission shall render initial and final decisions based thereon.

15. Part A of the regulation states the long-standing criteria of the FCC, excluding only that portion of the criterion of "integration of ownership and management" struck down in Bechtel II, and the preferences for minority and female ownership struck down in or contrary to Aderand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) and Lamprecht v. FCC, 958 F.2d 382 (D.C.Cir. 1992). The regulation eliminates the former policy to elevate the "Mom and Pop" style of management as superior to the "Corporate America" style of delegated management to the point

where evidence of the former was admitted and evidence of the latter was excluded. The regulation substitutes all forms of ownership without regard management selected by that ownership.

16. Part B of the regulation permits the FCC to process comparative cases for which hearing records have already been completed without reopening the closed records, while providing applicants the opportunity to brief their cases under the revised criteria. There is no unfairness to the parties, whose applications were filed based on the broadcast experience and records, local residence and civic activities of the parties, their proposed signal coverage and their impact on the principle of favoring diversity of ownership of media of mass communications. The revised criteria only make adjustments to remove the "integration" gloss on the parties' credentials and to follow judicial decisions relative to minority and gender-based preferences.

17. There is no change in established FCC rules and procedures providing that applicants disqualified from becoming an FCC broadcast licensee for financial, technical, character or other grounds are not entitled to comparative consideration.

V.
There should be no privileges in the auction rules for women or minorities

18. The Commission has already held that the law of the land does not allow special privileges for women or minorities in the auction of public frequencies. Sixth Report and Order, 11 FCC Rcd. 136 (1995). This determination has been upheld on

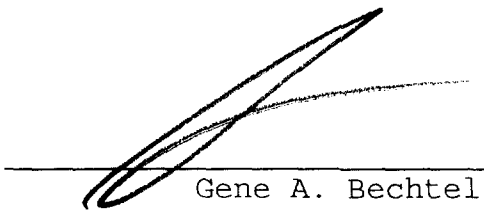
appeal. Omnipoint v. FCC, 78 F.3d 620 (D.C.Cir. 1996).

19. With regard to special privileges for women, the Lamprecht decision, supra, struck down comparative hearing preferences as unconstitutional and, as noted in the Commission's notice of proposed rulemaking at ¶90, the Supreme Court in United States v. Virginia Military Institute, 116 S.Ct. 2264, 2274-76 (1996), held that distinctions based on gender must be supported by "exceedingly persuasive justification."

20. With regard to special privileges for minorities, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) reversed the holding in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) that minority-based preferences in broadcast proceedings were constitutional.

21. As noted by the Commission and the court in the Sixth Report and the Omnipoint decision, many women and minorities own small businesses and they, along with others, will benefit from the auction preferences accorded to all small businesses.

Respectfully submitted,



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